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Study on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples focusing on a voluntary mechanism

Note by the secretariat

Pursuant to a decision of the United Nations Permanent Forum on Indigenous Issues at its eleventh session (see E/2012/43, para. 109), Dalee Sambo Dorough and Megan Davis, members of the Forum, were appointed to undertake a study on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples, focusing on a potential voluntary mechanism to serve as a complaints body at the international level, in particular for claims and breaches of indigenous peoples' rights to lands, territories and resources at the domestic level. The outcome of the study is hereby submitted to the Permanent Forum at its thirteenth session.

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Study on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples focusing on a voluntary mechanism

I. Introduction

1. Since the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, there has been discussion about the need for a mechanism by which to monitor the implementation of the Declaration and its interpretation in international law. This was partly recognized in article 42 of the Declaration which states:

> The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

2. Following its discussions on article 42 in 2009, the Permanent Forum hosted an international expert group meeting on the role of the Permanent Forum in the implementation of article 42 of the Declaration (E/C.19/2009/2). In recent times there has been increased cooperation and coordination between the Permanent Forum, the Special Rapporteur on the rights of indigenous peoples and the Expert Mechanism on the Rights of Indigenous Peoples, and the unique nature of each of the three mandates has influenced this relationship. Each of these mechanisms contributes significantly to the implementation of the Declaration, although not in a wholly coordinated way. In addition, these bodies and their secretariats have significant workloads and commitments and therefore none of them can function as an oversight body for the implementation of the Declaration.

3. Indigenous peoples in particular are becoming increasingly concerned that a mechanism is needed to monitor and coordinate the implementation of the Declaration. The outcome document of the Global Indigenous Preparatory Conference for the World Conference on Indigenous Peoples (A/67/994, annex), held in Alta, Norway, in June 2013 (the Alta Declaration) and the Lima Declaration of the World Conference of Indigenous Women, held in Lima in October/November 2013, recommend a mechanism to review, monitor and report on the Declaration. The Alta Declaration recommended the creation of a new United Nations body with a mandate to promote, protect, monitor, review and report on the implementation of the rights of indigenous peoples, including but not limited to those affirmed in the Declaration, and that such a body be established with the full, equal and effective participation of indigenous peoples.

4. Perhaps the most acute reason for the increased attention being given to the establishment of a mechanism is in the work of the Special Rapporteur, who, through his mandate, has conducted many country visits. Despite the expressions of commitment to the Declaration worldwide, the Special Rapporteur has observed "lack of knowledge and understanding about the Declaration, the values it represents or the deep-seated issues confronting the indigenous peoples that it addresses" (A/68/317, para. 78). According to the Special Rapporteur, a still pending crucial task is raising awareness about the Declaration among Government actors, the United Nations system, indigenous peoples themselves and, more generally, society. The creation of a complaint mechanism is one way to promote

greater understanding of the content of the Declaration and, thereby, awareness. It will remain difficult for the goals of the Declaration to be achieved amid competing political, economic and social forces unless the authorities and non-indigenous sectors of the societies within which indigenous peoples live come to share in awareness and conviction concerning those goals.

5. The Special Rapporteur's concern about the insufficient knowledge and use of the Declaration by States and civil society has played out in the universal periodic review. He has characterized this dynamic, as well as lack of recognition of the significant normative weight of the Declaration and its foundations in equality and human rights as factors that debilitate commitment to and action by States. The lack of knowledge and expertise globally on the Declaration is of concern to the Permanent Forum. The failure of some States to take seriously the goals and rights contained within the Declaration is detrimental to indigenous peoples' rights and well-being.

6. One way of addressing the paucity of knowledge and the lack of consistency in its implementation is to establish a mechanism to protect, review, monitor and report on the Declaration. This mechanism can be empowered through the development of an optional protocol. There is a lack of literature on the technical aspects of such an optional protocol. There is no literature that militates against advocacy for an optional protocol. In fact, the literature reveals persuasive precedents within the United Nations system which, for well over 30 years, has established additional or supplementary mechanisms associated with an international human rights instrument — notably declarations — that have not crystallized in the form of a treaty to be acceded to and ratified by States. We draw attention to the communication procedure of the Commission on the Status of Women established in 1947 by the Economic and Social Council in its resolution E/76 (V), decades before the existence of the Convention on the Elimination of All Forms of Discrimination against Women. In addition, since 1975, the Commission on Human Rights (which became the Human Rights Council in 2006) not infrequently established a variety of mechanisms aimed at improving the protection of human rights, particularly where there appeared to be a consistent pattern of human rights violations. The procedure for dealing with communications relating to violations of human rights and fundamental freedoms established by the Council in 1970 in resolution 1503 (XLVIII) (called the "1503 procedure") was one such mechanism. Another non-treaty-based mechanism is the Working Group on Arbitrary Detention, established by the Commission in resolution 1991/42, the mandate of which has been extended by Human Rights Council resolution 6/4 and subsequent resolutions. The mandate of the Working Group is to consider individual complaints and is based on articles 7, 9-11, 13, 14 and 18-21 of the Universal Declaration of Human Rights. Another example is the Working Group on Enforced or Involuntary Disappearances, established by the Commission in 1980 (resolution 20 (XXXVI)).

7. Prior to discussion about the potential form and content of an optional protocol to the Declaration, some fundamental principles must be stated and recognized. As noted above, the Alta Declaration proposes a new United Nations body that protects indigenous peoples' rights; so, too, should any new mechanism based on the present study. It must be noted that the recommendations made to the Permanent Forum specify that it should highlight the question of lands, territories and resources. However, the basic principles that underscore the universality of human rights and stress that they are interrelated, interconnected, indivisible and interdependent,

including those embraced by the Declaration, must be fully recognized in the context of the advancement of a possible optional protocol.[1] The Declaration, as an indigenous-specific human rights instrument, must therefore be understood as a whole and its various articles must be interpreted in relation to one another.

8. Furthermore, the jurisprudence that is evolving through the United Nations treaty bodies and mechanisms, as well as in regional human rights bodies in Africa, the Inter-American system and elsewhere, remains highly important. The rulings of regional bodies, such as the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights, are legally binding. Such jurisprudence must be safeguarded and in no way diminished or undercut by any potential mechanism. In this regard, a voluntary protocol to the Declaration would mean that States could not insist upon contradictory understandings or substandard positions being binding on indigenous peoples. In fact, given the normative weight of the Declaration — the human rights norms that are embraced by the Declaration, including core principles of equality, non-discrimination, cultural integrity, property and self-determination — discussions about and the development of additional procedures or a voluntary protocol are a natural development in international human rights law (see A/68/317, para. 64). This has been the case in regard to women's rights, arbitrary detention and disappearances.

9. Indeed, any outcome from the present study, including possible negotiated understandings or agreements, must not fall below the minimum standards of the Declaration. Any such outcomes must be consistent with the protection and promotion of the rights of indigenous peoples as well as the jurisprudence of United Nations and regional treaty bodies. For this reason, any future mechanism would have to be worked out in broad terms that must be agreed to by States and indigenous peoples.

10. Section II below describes what an optional protocol is and why optional protocols are used in international human rights law. It includes examples of current optional protocols and describes the limitations of such instruments. Section III explains why the Declaration would be strengthened by an optional protocol.

II. What is an optional protocol?

11. An optional protocol is a supplementary agreement to a main agreement. Human rights treaties are often accompanied by an optional protocol intended to establish a specific complaint mechanism and procedure for protecting human rights and enforcing the original treaty, or to supplement a substantive area of the treaty with further measures to be subscribed to by States parties. Once acceded to, the optional protocol becomes legally binding under international law. An optional

[1] See, for example, H. Steiner, P. Alston and R. Goodman, *International Human Rights in Context: Law, Politics and Morals*, 3rd edition (Oxford University Press, 2007); J. Donnelly, "The relative universality of human rights", *Human Rights Quarterly*, vol. 29, No. 2 (May 2007); E. Brehms, *Human Rights: Universality and Diversity* (The Hague, Martinus Nijhof, 2001); Office of the High Commissioner for Human Rights, "What are human rights?", available from www.ohchr.org/en/issues/pages/whatarehumanrights.aspx; Dalee Sambo Dorough, "Human rights", in United Nations, *State of the World's Indigenous Peoples* (United Nations publication, Sales No. 09.VI.13), chap. IV; United Nations Population Fund, Human Rights Principles, available from www.unfpa.org/rights/principles.htm.

protocol "may be on any topic relevant to the original treaty and is used either to further address something in the original treaty, address a new or emerging concern or add a procedure for the operation and enforcement of the treaty — such as adding an individual complaints procedure".[2]

12. Optional protocols often contain stricter measures than the treaty to which they relate; States parties may choose whether to ratify the optional protocol, and therefore they are not automatically binding on the original parties to the treaty. In addition, optional protocols have their own specific ratification mechanisms that operate independently of the original treaties; generally, only States that have already agreed to be bound by an original treaty may ratify its optional protocols.[3]

Why adopt an optional protocol?

13. If a treaty has not made sufficient provision for its enforcement and accountability, an optional protocol is often created to fulfil this function. Accountability functions can involve an individual complaints process, known as a "communications procedure", or an "inquiry procedure". A communications procedure permits individuals or groups representing individuals to bring a complaint to the supervisory committee responsible for monitoring implementation of the treaty. The inquiry procedure enables a supervisory committee to investigate on its own volition. In the United Nations human rights treaty system, an optional protocol establishes judicial and review authority for human rights committees. That is, through an optional protocol a committee may review individual complaints in a way similar to that of a traditional human rights court. Also, in cases of grave and systematic violations of human rights, some committees can initiate an investigation in an attempt to hold States parties accountable.[4]

14. In addition, an "early warning" and an "urgent action" capacity allow a treaty body to insert itself into an ongoing "urgent" situation of human rights violation in an attempt to compel immediate compliance by a State.

15. The two Optional Protocols to the International Covenant on Civil and Political Rights were developed because the States parties considered that in order to achieve the purposes of the Covenant and the implementation of its provisions it would be appropriate to enable the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

16. The first Optional Protocol is an individual complaints mechanism enabling individuals to submit complaints or communications to the Human Rights Committee; the Second Optional Protocol, aiming at the abolition of the death penalty, is also monitored by the Human Rights Committee.

17. In resolution 54/4, the General Assembly, recalling that the Beijing Platform for Action supported the process initiated by the Commission on the Status of Women with a view to elaborating a draft optional protocol to the Convention on the

[2] United Nations Children's Fund, Introduction to the Convention on the Rights of the Child, available from www.unicef.org/crc/files/Definitions.pdf.

[3] The Optional Protocols to the Convention on the Rights of the Child are exceptions.

[4] See Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Take Action NOW! Advocacy Kit, 2004, available from www.iwraw-ap.org/documents/OP_to_ICESCR_Advocacy_KitInt.pdf.

Elimination of All Forms of Discrimination against Women that could enter into force as soon as possible on a right-to-petition procedure, adopted the Optional Protocol on 6 October 1999; it entered into force on 22 December 2000.

18. That Optional Protocol includes an inquiry procedure and a complaints procedure that allows the Committee on the Elimination of Discrimination against Women to conduct inquiries into grave and systematic abuses of women's human rights in States parties to the Optional Protocol (art. 8). The Optional Protocol is based on the article 20 inquiry procedure of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

19. The preamble of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, while less explicit than others regarding the reasons for the elaboration of an optional protocol, allows for the investigation of substantial abuses of women's human rights by an international body of experts; is useful where individual communications fail to reflect the systemic nature of widespread violations of women's rights; allows widespread violations to be investigated where individuals or groups may be unable to submit communications (for practical reasons or because of fear of reprisals); gives the Committee an opportunity to make recommendations regarding the structural causes of violations; and allows the Committee to address a broad range of issues in a particular country.[5]

20. The Convention on the Rights of the Child has two Optional Protocols, adopted at the same time. One is the Optional Protocol on the involvement of children in armed conflict and the other is the Optional Protocol on the sale of children, child prostitution and child pornography. With regard to the former, the preamble is explicit about the reasons for its development and adoption. It states that: States parties are disturbed by the harmful and widespread impact of armed conflict on children and the long-term consequences it has for durable peace, security and development and condemn the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places generally having a significant presence of children, such as schools and hospitals. It also cites the need to further strengthen the implementation of the rights contained in the Convention, noting the adoption of the Rome Statute of the International Criminal Court and, in particular, its inclusion as a war crime of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts.

21. The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force on 22 June 2006. It allows for the creation of a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. The preamble expressly states that the reason for the Optional Protocol is to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

[5] United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), Convention on the Elimination of All Forms of Discrimination against Women: What is an optional protocol?, available from www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm.

22. The Optional Protocol to the Convention on the Rights of Persons with Disabilities entered into force on 3 May 2008. Under the Optional Protocol, States parties recognize the competence of the Committee on the Rights of Persons with Disabilities to receive and consider communications from or on behalf of individuals or groups of individuals subject to their jurisdiction who claim to be victims of a violation of the provisions of the Convention (art. 1).

Are there limitations to optional protocols?

States parties

23. The limitations to optional protocols are that, most commonly, the communications processes can be used only by individuals or groups in States that are party to and have ratified the relevant treaty.

Legal status

24. The legal status of committee decisions under an optional protocol varies. It is a basic principle of international law that State legal systems are sovereign and that for a decision to have legal consequence domestically, an enabling act is usually required to transform international law into domestic law; committee "views" are not binding in the way that decisions of domestic courts are binding, nor are States free to disregard them at will. The legal force of the committee's views lies between these two extremes, and its reports constitute, at a minimum, very persuasive analyses and guidance.[6] Essentially, optional protocols are "optional", or voluntary, and therefore ratifying them indicates a transaction of good faith between the State and the individuals and groups involved in the relevant subject matter; in the case of the Declaration, between indigenous peoples and the State.

Reservations

25. States parties may enter reservations when ratifying treaties or optional protocols as long as they are not incompatible with the principles of the instrument. However, as the Declaration is a declaration of the General Assembly, this would not be necessary. Indeed, because a declaration is not a treaty, it may be that an optional protocol can achieve more lasting and mutually agreeable outcomes owing to its voluntary or optional nature.

III. Why is an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples needed?

26. While States already have binding obligations in international law in regard to the right to self-determination and property rights, in the context of indigenous peoples, based on customary international law, there is an urgent need for additional, explicit measures to be taken. There is a need for the establishment of a mechanism to monitor both the content and the weight of the Declaration. An optional protocol, developed in cooperation with States, is one mechanism that could facilitate this. In relation to the right to self-determination, rights to lands, territories and resources

[6] Human Rights Resource Law Centre, "Australia's ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", Melbourne, July 2009.

and the right of free, prior and informed consent, in particular, there is a need to monitor and consolidate the content and weight of such rights. The exigency for such a mechanism is explained primarily with reference to the work of the Special Rapporteur on the rights of indigenous peoples, who has raised a concern, on the basis of his own observations over five years, that the Declaration is weakened by certain ambiguities and positions about its status and content (A/68/317, para. 87). In particular, continual reference to the Declaration as "non-binding or merely aspirational" accords the Declaration a "diminished status" and rationalizes "a diminished commitment to its terms" (ibid., para. 60).

What are declarations?

27. Declarations are adopted by resolution of the General Assembly, pursuant to Article 13 of the Charter of the United Nations which empowers the Assembly to make recommendations with respect to the progressive development of international law and its codification and in assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[7] Declarations can be compared to or contrasted with treaties, which are "binding" upon those States that ratify them and incorporate them in domestic law. The distinction between "binding" and "non-binding" is brought into sharp focus when considering the Declaration. An overemphasis on the non-binding status of the Declaration can imply that the instrument is not effective or has no legal consequence; this is incorrect. According to the Special Rapporteur, to say simply that the Declaration is non-binding is an incomplete and potentially misleading characterization of its normative weight. It has long been widely understood that standard-setting resolutions of the General Assembly can and usually do have legal implications, especially if called "declarations", a denomination usually reserved for standard-setting resolutions of profound significance (ibid., para. 61).

28. In regard to declarations of the General Assembly, even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the Charter, other treaty commitments and customary international law. The Declaration builds upon the general human rights obligations of States under the Charter and is grounded in fundamental human rights principles, such as non-discrimination, self-determination and cultural integrity, that are incorporated into widely ratified human rights treaties, as evident in the work of United Nations treaty bodies. In addition, core principles of the Declaration can be seen to be generally accepted within international and State practice, and hence to that extent the Declaration reflects customary international law.

29. On the issue of customary international law, Emmanuel Voyiakis states that General Assembly resolutions can provide inspiration for the development of new customary international practices and that they may often help to sharpen existing customary practices,[8] an example being the Universal Declaration of Human Rights.

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[7] For the purposes of this study, the focus is on declarations adopted by the General Assembly. However, it is understood that not all declarations are adopted by the Assembly, e.g., declarations adopted by the International Labour Organization (ILO).

[8] Emmanuel Voyiakis, "Voting in the General Assembly as evidence of customary international law?" in *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Stephen Allen and Alexandra Xanthaki, eds. (Hart Publishing, 2011).

30. Despite its non-binding character and non-treaty status, the Declaration is a consensus document that received the support of the majority of the States Members of the United Nations, and subsequently all Member States, because it already "embodies many human rights principles already protected under international customary and treaty law and sets the minimum standards for States parties' interactions with the world's indigenous peoples".[9] This consensus, and the authoritative nature of the instrument, means that, under the Charter, specifically Articles 1 (2), 1 (3), 55 and 56, Member States have an obligation to respect and promote those rights.

Customary international law

31. It is the position of the International Law Association Committee on the Implementation of the Rights of Indigenous Peoples (formerly the Committee on the Rights of Indigenous Peoples) and the Special Rapporteur on the rights of indigenous peoples that aspects of the Declaration constitute customary international law: The relevant areas of indigenous peoples' rights with respect to which the discourse on customary international law arises are self-determination, autonomy or self-government, cultural rights and identity, land rights as well as reparation, redress and remedies.[10] Lorie Graham and Siegfried Wiessner provide the following explanation:

> [The Declaration] is a solemn, comprehensive and authoritative response of the international community of States to the claims of indigenous peoples, with which maximum compliance is expected. Some of the rights stated therein may already form part of customary international law, others may become *fons et origo* of later-emerging customary international law. Scholarly analyses of State practice and *opinio juris* have concluded that indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life; that they hold the right to political, economic and social self-determination, including a wide range of autonomy, and that they have a right to the lands they have traditionally owned or otherwise occupied and used.[11]

32. Customary international law as a source of international law can emerge when a significant number of States hold common agreement with respect to a norm, its content and compliance. To meet the requirements of customary international law as set down by the International Court of Justice, evidence is required of widespread State practice in addition to *opinio juris*, which translates as the belief by States that such practice is required by law.[12] Once the State practice and belief are established, the custom can crystallize into binding international law, if such acts amount to

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[9] Law Council of Australia, Background Paper, "Policy statement on indigenous Australians and the legal profession", February 2010.

[10] International Law Association, Committee on the Rights of Indigenous Peoples, The Hague Conference (2010): Rights of Indigenous Peoples, Interim Report, available from www.ila-hq.org/en/committees/index.cfm/cid/1024.

[11] Lorie M. Graham and Siegfried Wiessner, "Indigenous sovereignty, culture and international human rights law", *South Atlantic Quarterly*, vol. 110, No. 2 (Spring 2009).

[12] *North Sea Continental Shelf* (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*), *Judgment, I.C.J. Reports 1969*.

settled practice. While the test is "notoriously difficult to achieve",[13] according to the Special Rapporteur, it cannot be much disputed that at least some of the core provisions of the Declaration, with their grounding in well-established human rights principles, possess these characteristics and thus reflect customary international law (A/68/317, para. 64). This is supported by the International Law Association, which has stated that even though it cannot be maintained that the Declaration as a whole can be considered as an expression of customary international law, some of its key provisions can reasonably be regarded as corresponding to established principles of general international law, therefore implying the existence of equivalent and parallel international obligations with which States are bound to comply.[14]

33. In addition, the International Law Association concluded in its report that the unequivocal judicial and para-judicial practice of treaty bodies, as well as the pertinent State practice at both the domestic and international levels, unequivocally show that a general *opinio juris* as well as *consuetudo* exist within the international community, according to which certain basic prerogatives that are essential in order to safeguard the identity and basic rights of indigenous peoples are today crystallized in the realm of customary international law.[14]

Peremptory norms of international law

34. The Declaration also reflects *jus cogens*, or peremptory norms of international law. Peremptory norms are universal norms from which no derogation is permitted, even a contrary treaty provision. Peremptory norms include freedom from genocide and the international norms prohibiting racial discrimination. In addition, the right to self-determination is viewed by many as a peremptory norm.

Lands, territories and resources

35. In relation to customary international law, one of the areas that commentators and lawyers agree is a distinct body of developing customary international law is land, territories and resources. According to the International Law Association, State practice with respect to indigenous land rights has developed both at the legislative (including constitutional) and jurisdictional levels.[14] Since the adoption of the Declaration, Professors Anaya and Wiessner have argued, on the basis of a global study of State practice with respect to indigenous land, a distinct body of customary law that accords with the indigenous right to demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used.[15] This norm was asserted by the Inter-American Court of Human Rights in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. In its lawsuit filed before the Court, the Inter-American Commission on Human Rights asserted that there is an international customary international law norm which affirms the rights of indigenous peoples to their traditional lands. Nicaragua did not refute this assertion,

[13] Megan Davis, "To bind or not to bind: the United Nations Declaration on the Rights of Indigenous Peoples five years on", *Australian International Law Journal*, vol. 19 (2012).

[14] International Law Association, Interim Report.

[15] S. James Anaya and Siegfried Wiessner, "The UN Declaration on the Rights of Indigenous Peoples: towards re-empowerment", JURIST, 3 October 2007, available from http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php.

therefore acquiescing with the assumption that indigenous land rights are protected by customary international law.[16]

36. In addition, the International Law Association has identified jurisprudence emanating from the United Nations treaty bodies in relation to lands, territories and resources, including the Human Rights Committee, which stressed the obligation of States parties to the International Covenant on Civil and Political Rights to provide an effective restitution of ancestral lands to indigenous peoples (A/HRC/4/77, para. 8);[14] the Committee on the Elimination of Racial Discrimination, which proclaimed in its general recommendation No. 23 an obligation for States parties to the International Convention on the Elimination of All Forms of Racial Discrimination to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories (para. 5).

37. On this point, the International Law Association report found that in recent times a significant number of States have developed reparation policies aimed at redressing indigenous peoples for the lands they had been deprived of.[10] The Association has found this practice emerging from Argentina, Australia, Bangladesh, Belize, Bolivia (Plurinational State of), Botswana, Brazil, Cambodia, Canada, Chile, Colombia, Costa Rica, Ecuador, India, Japan, the Lao People's Democratic Republic, Malaysia, Mexico, New Zealand, Nicaragua, Norway, Paraguay, Peru, the Philippines, South Africa, the United States of America, Venezuela (Bolivarian Republic of), Taiwan Province of China and the European Union.[10]

IV. Process of developing of an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples in relation to lands, territories and resources

38. Disputes between States, third parties and indigenous peoples over lands, territories and resources have been and continue to be the subject of protracted and costly litigation. Yet the Permanent Forum has previously emphasized the role the Declaration can play in shifting the dynamics of disputes between indigenous peoples and States. In cases where negotiations with the State did not succeed, the Declaration could be a major factor in litigation for rights or in complaints brought before the human rights treaty bodies. The Declaration could also help to shift the dynamics of disputes so that the burden of proof was not always placed on indigenous peoples, but rather on States. Participants have referred to examples where the Declaration had already been effectively used in dialogue between indigenous peoples and the State.

39. The role that the Declaration can play in dialogue between indigenous peoples and States underpins the impetus for the development of an optional or voluntary protocol. Therefore, it is important that the elements of such an agreement be carefully considered. We consider that an optional protocol to the Declaration should be (a) voluntary; (b) confined to the Declaration's provisions that pertain to

[16] HR1/GEN/1/Rev 7, General Recommendation XXIII (1997), *The Rights of Indigenous Peoples*, para. 5.

lands, territories and resources; (c) negotiated through extensive dialogue between indigenous peoples and nation States; and (d) negotiated on the basis of an "agreement in principle". In addition, the committee or other mechanism established under the optional protocol should be composed of independent human rights experts.

A. Voluntary nature of the optional protocol

40. In order for any mechanism such as an optional protocol to be effective and develop satisfactory and lasting solutions, it must develop incrementally. We therefore suggest that the mechanism for the Declaration be optional, or voluntary, and should not compel States to engage. Cooperation and partnership should define the work of developing the mechanism, as this reflects the spirit of the Declaration. The mechanism would provide an informal, voluntary process or pathway for parties to resolve disagreements in a cooperative environment in order to reach a mutually acceptable resolution. The outcomes should ultimately ensure implementation of the Declaration's standards and further protect and promote the rights of indigenous peoples. This approach gives participants greater control over the outcomes and is more likely to lead to successful and sustainable solutions. However, such a voluntary mechanism cannot serve as a way for States to avoid being monitored by existing international or regional human rights bodies and mechanisms or domestic courts; rather, an optional protocol should invite States to act in good faith and to engage at a higher level of commitment and to raise standards on the basis of mutually acceptable resolution.

41. It would be useful for the mechanism to have both a communications and an inquiry procedure. The inquiry aspect could invite a more proactive process that would prompt attention and, eventually, dialogue and negotiations by the parties concerned rather than a punitive approach. Once a State has "voluntarily" submitted to the mechanism, the procedure would be one that would trigger dialogue and negotiation.

B. Measures confined to Declaration provisions pertaining to lands, territories and resources

42. It would seem preferable at the outset to confine these initial voluntary measures to the issues related to lands, territories and resources, because these are the provisions that seem to trigger the most difficult matters to resolve by States, indigenous peoples and third parties. The proliferation of litigation and jurisprudence internationally over the past decade on lands, territories and resources highlights the importance and urgency of such an approach.[17] The reports of the Special Rapporteur

[17] International Law Association, Interim Report; International Law Association, Committee on Rights of Indigenous Peoples, Sofia Conference (2012), Final Report, available from www.ila-hq.org/en/committees/index.cfm/cid/1024. Both reports discuss the proliferation of both litigation and jurisprudence specifically concerning indigenous land rights. See, for example, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador* (Merits and Reparations), Inter-American Court of Human Rights, Ser. C, No. 245, 27 June 2012; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (Merits), African Commission on Human and People's Rights, communication No. 276/2003, 25 November 2009.

on the rights of indigenous peoples illustrating the significant struggles of indigenous peoples around the world in relation to their lands, territories and resources provide cogent evidence of the pressing need for a mechanism that encourages negotiation and dialogue between parties. A committee or other mechanism could monitor and provide expert advice on established principles and developing norms. For example, there is a lot of interest in free, prior and informed consent, particularly on the part of the business sector. Such a body could be informed by the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31, annex), endorsed by the Human Rights Council in its resolution 17/4. The option for States, indigenous peoples and third parties to discuss the content and weight of free, prior and informed consent could provide some coherence to the meaning of such consent on the basis of the important work of the Special Rapporteur in elucidating the procedural aspect of free, prior and informed consent (based on comprehensive consultations with stakeholders), as well as potentially avoiding costly litigation.

43. It must be acknowledged that in relation to free, prior and informed consent, the Declaration has been explicitly addressed by the Global Compact and the Working Group on the issue of human rights and transnational corporations and other business enterprises. Furthermore, special rapporteurs and independent experts continue to address such consent in the context of the Declaration, the United Nations human rights treaty bodies, regional human rights mechanisms, the Permanent Forum and the Expert Mechanism on the Rights of Indigenous Peoples. Therefore, an optional protocol and committee or other mechanism associated with the Declaration could be guided accordingly in favour of protecting and promoting the rights of indigenous peoples. The establishment of an optional protocol based on the lands, territories and resources provisions of the Declaration can be considered a starting point after which measures could be expanded to the whole of the Declaration, with an understanding of the interrelated, interdependent, indivisible and interconnected nature of human rights, ensuring that these fundamental provisions will be interpreted in the context of the whole of the Declaration, other international human rights law and relevant domestic law.

C. Measures negotiated through extensive dialogue between indigenous peoples and States

44. Negotiation of the optional protocol must take place through extensive dialogue between indigenous peoples and States. This could be done through a series of expert meetings, as a human rights working group, or coordinated by the Expert Mechanism on the Rights of Indigenous Peoples, the Special Rapporteur on the rights of indigenous peoples and the Permanent Forum. Dialogue and negotiation between the two parties are essential to ensure that the optional protocol has legitimacy. Importantly, indigenous peoples' participation is a way of realizing the right to self-determination, and the process would trigger all necessary elements of free, prior and informed consent. In addition, indigenous peoples and States are more likely to take the work of the mechanism seriously if they have had an equal role in its development, as occurred with the Declaration.

D. Measures negotiated on the basis of an "agreement in principle"

45. Finally, it would be highly constructive to develop an "agreement in principle" that reinforces the rights of indigenous peoples so that there is agreement on the fundamental principles that will guide discussions or negotiations about an optional protocol to the Declaration. In this way, all parties will have a clear understanding of basic ground rules throughout the design or creation of this much-needed mechanism. Such an agreement could include recognition of the Declaration and its normative weight, principles of equality and non-discrimination, the right to self-determination of indigenous peoples being given full effect in relation to their direct engagement in the negotiations, acknowledgement that the intent of the optional protocol is the promotion and protection of the rights of indigenous peoples, recognition of the need for all parties to act in good faith, acceptance of the interrelated nature of the Declaration's standards, a suggested time frame for completion of the discussion, dialogue or negotiation concerning the optional protocol and provision for financial support to ensure indigenous peoples' direct engagement in the discussions.

E. Committee or other mechanism composed of independent human rights experts

46. The committee or other mechanism should be composed of a pool of independent international human rights law experts who are versed, skilled, educated and/or experienced in indigenous cultural contexts. Members should have demonstrated expertise in subject areas of the Declaration. Members of this pool could be called upon or appointed, in collaboration with the indigenous peoples and the State concerned, and dispatched to review a situation, on the basis of a communications or inquiry procedure. The position would require any member to be ready and willing to be dispatched to a State if necessary. This suggested composition of such a mechanism promotes agility, integrity and top-level international legal expertise. Finally, it is our belief that as beneficiaries of the rights contained in the Declaration, indigenous peoples should have significant weight in collaborating with States on the selection of such experts, in the spirit of collaboration that was embedded in the process of drafting the Declaration.[18]

[18] One precedent was the drafting process of the Declaration itself, wherein indigenous peoples effectively changed the rules of the United Nations by insisting on, and successfully securing, their direct role in the entire standard-setting process, including, at some stages, indigenous co-chairs of key sessions of drafting groups. This dynamic was supported by Member States on the basis that indigenous peoples were the ultimate beneficiaries of the Declaration. Furthermore, in view of indigenous peoples' rights to lands, territories and resources; historical injustices; dispossession; and denial of land rights, the burden is squarely upon States to rectify these situations. See, generally, K. McNeil, "The onus of proof of aboriginal title", *Osgoode Hall Law Journal*, vol. 37, No. 4 (Winter 1999), where the author argues that indigenous peoples should be able to rely on present or past possession to raise a presumption of aboriginal title, and so shift the burden onto the Crown in proving its own title.

V. Conclusion and recommendations

47. The present study was written in response to a recommendation at the eleventh session of the Permanent Forum concerning an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples, focusing on a potential voluntary mechanism to serve as a complaints body at the international level, in particular for claims and breaches of indigenous peoples' rights to lands, territories and resources at the domestic level. This recommendation followed many years of discussion about the need for a voluntary or optional mechanism to monitor the implementation of the Declaration. The study has already highlighted the concerns of the United Nations about the lack of comprehensive national, political and legal initiatives aimed at upholding the minimum standards of the Declaration. In particular, the annual report of the Special Rapporteur on the rights of indigenous peoples to the General Assembly (A/68/317) emphasized his grave concern for the "debilitating" actions of States in underplaying or minimizing the weight and content of the Declaration.

48. In order to have a voluntary or optional mechanism providing for a complaint mechanism aimed at negotiation and dialogue underpinned by the principle of partnership as enshrined in the Declaration:

- The mechanism should be voluntary at the request of States (including third parties) and indigenous peoples concerned.
- The mechanism should be confined to the provisions of the Declaration and those conflicts or contentious issues specifically pertaining to lands, territories and resources.
- The mechanism should be negotiated through extensive dialogue between indigenous peoples and States on mutually agreed terms.
- The committee or mechanism established under the optional protocol should be composed of key international lawyers experienced in international law and indigenous human rights, including the Declaration, selected by indigenous peoples and States in collaboration. The members will not be remunerated (with the exception of expenses); they should be easily accessible and willing to be dispatched.